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Letter dated 30 December 2003 from the Chairman of the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council

I write with reference to my letter of 9 October 2003 (S/2003/1005). The Counter-Terrorism Committee has received the attached fourth report from Austria submitted pursuant to paragraph 6 of resolution 1373 (2001). I would be grateful if you could arrange for the present letter and its annex to be circulated as a document of the Security Council.

(*Signed*) Inocencio F. **Arias**
Chairman
Security Council Committee established pursuant to
resolution 1373 (2001) concerning counter-terrorism

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Annex

Note verbale dated 23 December 2003 from the Permanent Mission of Austria to the United Nations addressed to the Chairman of the Counter-Terrorism Committee

The Permanent Mission of Austria to the United Nations presents its compliments to the Committee and in reference to the letter of 3 October 2003 has the honour to transmit Austria's fourth report on the implementation of Security Council resolution 1373 (2001) (see enclosure).

Enclosure*

16 December 2003

ADDITIONAL INFORMATION BY AUSTRIA TO THE COMMITTEE ESTABLISHED UNDER ARTICLE 6 OF RESOLUTION 1373 (2001) ADOPTED BY THE SECURITY COUNCIL AT ITS 4385TH MEETING ON 28 SEPTEMBER 2001

In its letter of 3 October 2003 the Chairman of the Counter-Terrorism Committee (CTC) established under Article 6 of United Nations Security Council Resolution 1373 (2001) asked Austria to submit further information on the steps taken to implement the resolution (Stage B). Austria is therefore pleased to provide the CTC with the following additional information.

I. Implementation Measures

Effectiveness in the protection of the financial system

I.1

In Austria two different regimes are in place in order to enforce the legislative provisions concerning the prevention and suppression of the financing of terrorism. Regarding the coordination among different agencies, it falls under the competence of the Oesterreichische Nationalbank (OeNB) to take the necessary measures in the field of financial sanctions, whereas the Federal Ministry of the Interior is primarily in charge of provisional measures in case of infringements of the Austrian Penal Code or the Austrian Banking Act which may be subsequently subject to court procedures.

In this context, the OeNB is responsible for the implementation of financial sanctions in particular concerning the supervision of the freezing of accounts belonging to persons, entities or bodies listed in various EC regulations. According to the provisions of these regulations, the Austrian credit institutions are obliged to freeze all funds belonging to persons, entities or bodies listed in these regulations.

The OeNB acts also as co-ordinator between the European Commission and the Austrian credit institutions.

On the other hand, the Federal Minister of the Interior, through its Federal Intelligence Unit, can block transactions upon notification of a suspicious transaction by a bank or other financial institution. This rapid response prevents any transfer of suspicious assets. The public prosecutor has to be informed about any such measure and the reasons for it without undue delay. Based upon this information, a preliminary injunction according to section 144a Code of Criminal Procedure can be issued in order to continue the freezing of the assets.

* Annexes are on file with the Secretariat and are available for consultation.

If there is no legal basis for a preliminary injunction, the public prosecutor has to request the Federal Intelligence Unit to defreeze the assets. The public prosecutor has to report any request to issue a preliminary injunction to the Federal Minister of Justice. In case of a request to defreeze assets, the report has to be made prior to the request.

I.2

The most recent amendment of the Banking Act, Federal Law Gazette I No. 35/2003 of 13 June 2003, added the financial transfer business to the banking activities defined under section 1 para 1 Banking Act. Financial transfer business is defined as "the transfer of assets, except for physical transports, by accepting money or other means of payment from the originator of the transactions and payment of a corresponding sum of money or other means of payment to the receiver by way of a non-cash transfer, communications, credit transfers or other use of a payment or settlement system". This provision will enter into force on 1 January 2004. By including the financial transfer business into the list of banking activities, any institution offering this activity needs a license from the Financial Market Authority (FMA) according to section 4 para 1 Banking Act. As a consequence, the FMA is the supervisory authority for all money remitters. This addition to the list of banking activities also leads to the application of sections 39 to 41 Banking Act (Customer Due Diligence provisions).

According to these provisions, "informal money/value transfer systems" are illegal under Austrian law and subject to criminal sanctions.

Therefore, FATF special :ecommendation VI (Alternative remittance) is fully implemented in Austria.

I.3

For a long time the existence of anonymous passbooks has been criticized. However, after amending the Banking Act Austria now fully complies with FATF recommendation 10. According to section 40 para 1 Banking Act, "all credit and financial institutions have to identify their customers (or the beneficial owner if a person is acting on the behalf of someone else) when establishing a business relationship. The opening of an anonymous passbook is not allowed in Austria anymore."

For existing anonymous passbooks section 40 para 1 subpara 7 provides that all these passbooks have to be denoted as special saving deposits. Any deposit on or withdrawal from such a saving deposit requires the previous identification of the holder. In addition, if someone wishes a withdrawal from an anonymous passbook with a balance of 15.000 € or more, the transaction must be reported to the Austrian financial intelligence unit for investigation (section 41 para 1a Banking Act).

Furthermore, according to section 31 para 3 in connection with section 99 para 18 Banking Act the transfer or acquisition of an anonymous passbook is forbidden and subject to sanctions.

In order to support the credit and financial institutions the Ministry of Finance issued a banking circular to inform about special due diligence requirements for transactions that split a large deposit into smaller ones and for withdrawals from anonymous saving passbooks before July 2002, as the amendment requiring the identification prior to any withdrawal entered into force in July 2002.

In an extensive special on-site examination the OeNB has verified the implementation of the new rules in about 100 Austrian banks.

Since every transaction now requires an identification of the holder, still existing anonymous passbooks will be eliminated over time. If no transaction occurs over a period of 30 years, the passbook is subject to the limitation of claims (section 1478 Civil Code).

I.4

A civil or administrative liability of legal persons is firmly established under Austrian law. As regards the Austrian criminal law, so far only a very limited criminal responsibility of legal persons exists, namely insofar as proceeds of a crime can be confiscated directly from a legal person if it has been illegally enriched (section 20 para 4 Penal Code); besides this, Austrian criminal law could be characterized by the principle "societas delinquere non potest".

However, in order to implement the Second Protocol to the EU Convention on the Protection of the Financial Interests of the European Community, Austria will be obliged to introduce criminal liability of legal persons. Thus, an amendment of the Penal Code introducing criminal liability of legal persons is currently under consideration. Nevertheless, the Austrian Penal Code provides additional measures in context with the confiscation of profits (section 20 Penal Code) and forfeiture (section 20b Penal Code). Particularly important in this connection is section 20b paragraph 1 Penal Code as (corporal and incorporeal) property being at the disposal of a criminal organization (section 278a Penal Code) or a terrorist group (section 278b Penal Code) or which has been provided or collected as a means for financing terrorism, shall be declared forfeited (see also in the annex the relevant provisions of the Penal Code).

I.5

In principle, Austrian law does not impose any specific time limits for which assets can remain frozen. Freezing of funds is addressed in the following provisions:

The Criminal Law Amendment Act of 2002, Federal Law Gazette I No. 134/2002, which entered into force on 1 October 2002, criminalizes inter alia the financing of terrorism and the collection of funds by terrorist groups and others for terrorist purposes.

Section 144a of the Austrian Code of Criminal Procedure, modified by the aforementioned Criminal Law Amendment Act, provides the freezing of assets within the disposition of a terrorist group as well as the freezing of funds collected or provided for the financing of terrorist acts.

This means that if there is suspicion of illegal profits, and it is supposed that these profits will be confiscated according to section 20 Penal Code, or if there is suspicion that property is at the disposal of a criminal or terrorist organization (sections 278a and 278b Penal Code), and was provided or collected for the purpose of financing terrorism (section 278d Penal Code), or derives from an offence, and it is supposed that this property will be declared forfeited according to section 20b Penal Code, the investigating judge must, upon application by the public prosecutor, issue a provisional injunction safeguarding such order, if there is concern that the enforcement of such order would otherwise be put in jeopardy or substantially impeded.

Concerning the request of another country to freeze funds linked to terrorism that are held in financial institutions in Austria, the Austrian law permits such a freezing irrespective of whether that country is a member of the EU or not. But if there is evidence that such funds are linked to terrorism, the relevant provisions of the Penal Code will apply. Thus, the above-mentioned injunction will be issued regardless of whether or not a request of another country to freeze such funds exists (see also in the annex relevant provisions of the Austrian law).

In addition, section 41 Banking Act provides for the temporary postponement of impending transactions.

Furthermore, section 99 subpara 17 Banking Act as well as sections 23 and 24 Foreign Exchange Act stipulate that any disposition over frozen accounts contrary to directly applicable EC Regulations is an administrative or criminal offence. This applies to all accounts frozen pursuant to EC regulations.

If there is no directly applicable EC regulation in place, section 78 paragraph 7 Banking Act empowers the Federal Government to prohibit, with the consent of the Main Committee of the National Council (first chamber of the Parliament) by way of regulation the disposition over accounts held with credit institutions in Austria if such accounts

(1) are the property of authorities or other state agencies of a particular state or of companies having their corporate seat in a particular state, or
(2) are the property of companies governed by certain authorities, agencies or companies (named in No. 1) either financially or by the way of organization or are otherwise economically controlled by these companies.

Although a number of suspicious transactions have been investigated, no link to financing of terrorism was established. For this reason there was no legal basis for issuing any provisional injunction pursuant to 144a Code of Criminal Procedure.

I.6

There exists an agreement on cooperation between the Federal Intelligence Unit, the Austrian money-laundering contact point, and the Federal Agency for State Protection and Counter-Terrorism (BVT), the competent authority to fight the financing of terrorism.

Accordingly, the money-laundering contact point reports possible cases of financing of terrorism to the BVT that investigates these cases. The money-laundering contact point in return is provided with information by the BVT so that it can take the necessary legal measures. It is mandatory that all cases finally be reported to the public prosecutor, which then may decide on further steps.

These procedures also apply with regard to requests from other States to investigate particular organizations suspected of having terrorist links.

As regards charitable and other non profit organizations, in order to be recognized they have to present their statute to the competent authority (Vereinsbehörde), which has to refuse their registration if they contain provisions contrary to Austrian law. According to the new Statute of Associations (Vereinsgesetz 2002) the financial statements of an association have to be revised annually by the statutory auditor under the same conditions as the financial statements of companies with limited liability or stock

companies, if the revenues (turnover) have exceeded 3 million € in the previous two years. If an association collects donations and the sum of these donations has exceeded 1 million € in the last two years, the financial statements have to be revised by an auditor as well in order to check that the money donated is made use of according to the statutory (and often publicly proclaimed) purpose. These control measures shall discourage abuse of these entities and ensure the detection of criminal activities and the identification of persons involved in such activities.

I.7

According to the provisions of the Banking Act, the FMA may within the scope of its mandate (banking supervision, which includes, inter alia, the prevention and combat of money laundering) appoint auditors, either from the Authority or from the OeNB, for the purpose of auditing credit institutions, their branch offices and representations outside of Austria and companies of the group of credit institutions.

Furthermore, there exists a money-laundering contact point in the Federal Intelligence Unit, which has policing, supervisory and advisory functions for the entire sector of banking and finance.

I.8

The OeNB regularly requests Austrian credit institutions to comply with the relevant provisions. So far, several inquiries of the OeNB in this regard gave as a result that in Austria no such accounts exist. One account - with an amount of about USD 4.000, - - was blocked in accordance with the respective provisions, but later de-freezed, as it could be cleared of alleged links to terrorist activities.

I.9

No cases have been reported yet. Upon request, the Austrian authorities would share information according to established rules in the field of justice and police cooperation.

Effectiveness of the counter-terrorism machinery

I.10

The legal framework for an effective fight against terrorism includes the Police Law, the Police Cooperation Law and the Code of Criminal Procedure.

In the field of criminal investigation and prosecution the fight against the financing of terrorism aims at destroying the financial basis of terrorist activities. This is also a keystone in the work of relevant police and judicial institutions. These investigations are triggered by suspicious facts collected by either national or foreign police, e.g. account holders have names similar to those of persons listed as terrorists. In none of these cases, relevant facts could be verified up to now. It should further be added that the crime "financing of terrorism", subject to up to 5 years in jail, has been established (section 278d Penal Code).

In Austria an informal working group (Counter Terrorism Intelligence) has been established to facilitate the exchange of information and the coordination of joint activities. Representatives of the Ministry of the Interior, of the Customs, of the Ministries of Economic and Labour Affairs, for Foreign Affairs, of Defence (Military Intelligence Office) and of Justice are participating in this working group.

As far as border controls are concerned, the Customs Service is responsible for checking security and safety aspects as well as carrying out customs clearances and customs controls. This is in line with the Communication of the European Commission concerning the role of Customs in the integrated management of external borders.

I.11

The legal basis for the control of transfers of arms and ammunition is the Austrian Foreign Trade Act and the War Material Act. According to these regulations all items included in the EU Common War Material List are subject to export controls.

When issuing export permits Austria takes into account the European Code of Conduct on Arms Exports as well as national principles and guidelines.

According to Criterion 7 of the EU Code of Conduct risks that the arms and equipment would be diverted within the buyer country or re-exported under undesirable conditions have to be assessed. To fulfil the purpose of Criterion 7 information about proliferation and terrorism including any proliferation or terrorism related activity or any involvement in clandestine or illegal procurement activities of the parties to the transaction are taken into account. Furthermore, the end-user of the transfer is assessed in accordance with the previous record of arms transfers.

Before ratifying the UN Protocol Against the Illegal Manufacture and Trafficking in Firearms, Their Parts and Components and Ammunition, Austria will have to amend its Foreign Trade Act, as the import or transit of arms is not yet subject to this act.

I.12

The procedure set up by Austria to deal with requests received from other States for assistance in criminal and judicial matters is set forth in the Austrian Extradition and Mutual Legal Assistance Act.

It should, however, be noted that the provisions contained therein only apply in the absence of conflicting rules of applicable bilateral and multilateral treaties. In this context, Austria is party to several Council of Europe and UN Conventions which contain provisions on mutual legal assistance. Furthermore, Austria has concluded bilateral treaties of mutual legal assistance with a large number of countries.

Under the Extradition and Mutual Legal Assistance Act, requests for assistance in criminal matters can be executed even in the absence of an applicable treaty on the basis of reciprocity, provided that the request emanates from a judicial authority and that the underlying facts constitute a criminal offence under Austrian law. However, the double criminality requirement does not apply to the service of documents if the person concerned is ready to accept them.

Assistance may not be granted if the facts underlying the request constitute a fiscal or political offence and if Austrian authorities would be prohibited under Austrian law from carrying out the action requested with regard to any similar offence had it been subject to investigation, prosecution or judicial proceedings under Austrian jurisdiction.

Requests for assistance are executed in accordance with the provisions of the Austrian Code of Procedure. A request to observe certain formal requirements can, however, be complied with as long as doing so would not be contrary to the basic principles of Austrian procedural law.

Competent authority for executing foreign requests for assistance is either the district court or the regional court, depending on the kind of assistance sought.

I.13

Undercover operations are permitted under section 54 Security Police Act (SPG) if they are necessary to prevent criminal offences. Visual and sound recordings may also be permitted under this provision. However, these measures only apply in order to prevent a serious crime.

Under section 22 SPG, persons testifying against criminal organizations have to receive special protection if needed. Section 54a provides for a new identity for witnesses and undercover agents. This provision also allows for the issuing of false documents by the authority.

Controlled deliveries and spurious purchases will only be allowed under section 23 if it is in the higher interest of the fight against criminal organizations or the prevention of a serious crime.

The use of "agents provocateurs" is illegal under section 25 Code of Criminal Procedure.

I.14

Austria signed the Convention on Cyber-Crime of the Council of Europe on 23 November 2001. Recently Austria fully implemented the Convention, in particular Articles 2 to 7 concerning computer-offences in the narrower sense as well as computer-referred falsifications and frauds by the Criminal Law Amendment Act of 2002.

This Amendment Act of 2002 includes new penal provisions as well as amendments to existing penal provisions against the abuse of computers in the broadest sense. A direct reference to counter-terrorism measures was established insofar as section 278c paragraph 1 subpara 6 Penal Code expressly establishes the elements of the offence "data damage" according to section 126a Penal Code as a possible terrorist offence.

The amendments include in particular the definition of the computer system in section 74 subpara 8 Penal Code as well as the following substantive penal provisions (sections of the Penal Code):

- section 118a: Illegal access to a computer system;
- section 119: Infringement of the secrecy of telecommunications;
- section 119a: Abusive interception of data;
- section 120, in particular paragraph 2a: Abuse of audio recording or listening devices;
- section 126b: Disturbance of the functioning of a computer system;
- section 126c: Abuse of computer programs or entrance data;
- section 225a: Counterfeit of data (see also the annex),

As regards Austrian legislation on interception of telecommunications and electronic surveillance, there are numerous investigative techniques, most of them provided for in the Austrian Law on Police Practice (LPP) and in the Criminal Procedure Code (CPC). The most important investigative techniques in connection with money laundering or the financing of terrorism and the predicate offences are:

- Observations (section 52 para. 2 LPP)
- Undercover operations/covert investigations (section 54 para 3 LPP)
- Controlled deliveries; for the time being, the existing provisions of international law in combination with sections 3 ff. Code of Police Cooperation (which provide for trans-border administrative assistance) are considered a sufficient legal basis (e.g. Art. 73 of the Convention implementing the Schengen Agreement; Art. 12 of the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union; Art. 22 of the Convention on Mutual Assistance and Cooperation between Customs Administrations).
- Searches of houses and persons (section 139 CPC)
- Interception of telecommunications (sections 149a – 149c CPC)
- Electronic surveillance (bugging and video recording, sections 149d – 149h CPC)

These investigative techniques are only admissible under certain circumstances if they are necessary to clear up criminal offences of varying gravity (including money laundering and financing of terrorism), some of them (searches, interception of telecommunications, electronic surveillance) generally have to be ordered by court.

I.15

No organisations have been notified as terrorist by Austria yet. There have neither been individuals notified as terrorists. Four persons have been arrested as terrorists or facilitators of terrorism since 2001.

Effectiveness of border controls

I.16

Currently there is no legislation requiring travellers to declare cash and other comparable means of payment. Precious stones and metals are covered by customs legislation and have to be declared. It is intended to introduce a legal obligation to declare cash and means of payment if requested by the customs officer. EC rules on this issue are still under consideration.

Border controls may be executed by the customs or the police. Controls are made routinely or in case of suspicion. No cases regarding financing of terrorism have been reported yet.

I.17

Austria is currently preparing its accession to the revised Kyoto Convention which has not entered into force yet. It is planed that the supply chain security aspect will be dealt with on the European level. A substantial amendment to the EC Customs Code covering this aspect is currently under consideration.

I.18

Currently there is no advance cargo information. With regard to passengers, neither the national authorities nor Austrian carriers provide for more information than required under APIS (Advanced Passenger Information System). However, foreign air carriers operating in Austria do provide data under PNR (Passenger Name Record).

I.19

According to the EC regulation 2320/2002, cargo and mail is subject to technical checks, which may be executed manually, if possible. As regards air cargo, these checks may occur randomly (about 1% of total, depending on risk assessment). The same applies to time-insensitive mail.

I.20

Citizens of the 21 countries listed by Austria as well as persons bearing travel documents issued by the authorities of these countries (such as refugees or persons without nationality) are subject to additional scrutiny when entering Austrian territory. Travel documents and visa are being screened according to the national and Schengen information systems even if their bearers are privileged third-country nationals having relatives with the nationality of one of the states of the European Economic Area.

Asylum seekers are, in addition to the procedures relevant for obtaining asylum, being scrutinized in the same way as visitors. In addition, their finger-prints are being documented in the system EURODAC.

EURODAC will especially help identify persons who have already sought asylum in another EU member state.

I.21

As the legal and factual situations described in preceding reports might have changed, Austria decided not to submit copies of such reports but rather to answer the questions directly. As regards the implementation of international best practices, codes and standards, according to FATF, Austria is in full compliance with all relevant international obligations.

II. Assistance and Guidance

II.2

Apart from the support to the UNODC, especially its Global Programme against Terrorism and its Terrorism Prevention Branch (TPB), there are no general Austrian programmes addressing all countries on technical assistance in Counter-terrorism. The Austrian Federal Ministry of the Interior maintains a dialogue with several countries, in particular with states of geographical vicinity in Eastern and South Eastern Europe. In this context, support is provided to partner countries including border security and terrorism prevention. These co-operation activities are addressing needs of individual partner countries on a case-by-case approach and an inclusion in the CTC Directory of Assistance might go beyond the scope of the Directory.